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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 15 1996

Tariff Filing Requirements) CC Docket No. 93-36
for Nondominant Carriers)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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MOTION FOR EXTENSION OF TIME TO FILE TARIFFS

Hyperion Telecommunications, Inc. ("Hyperion"), by its attorneys, hereby requests an extension of time to file tariffs in compliance with the Commission's September 18, 1995 *Order* in the above-referenced docket.^{1/} In the *Order*, the Commission amended its rules to require all nondominant carriers to file tariffs with specific rates, rather than a range of rates. The *Order* was issued in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Southwestern Bell v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) holding that Section 203 of the Communications Act of 1934 requires carriers to file tariffs with specific rates and that the Commission exceeded its authority in permitting carriers to file tariffs with a range of rates. The requirement to file tariffs with specific rates takes effect on March 11, 1996.

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996. Among other provisions, the 1996 Act grants the Commission authority to forbear from enforcing any regulatory requirement and establishes procedures for telecommunications carriers to petition for forbearance.^{2/} Pursuant to those procedures, Hyperion has filed today the attached Petition Requesting Forbearance.

^{1/} Hyperion is a competitive access provider that operates telecommunications networks throughout the country, typically in partnership with cable operators or electric utilities.

^{2/} 47 U.S.C. § 10.

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Hyperion believes there is a strong likelihood the Commission will grant its Petition. The Commission first adopted a forbearance policy with regard to tariff filing requirements for nondominant carriers in 1982.^{3/} Since that time, the Commission consistently and vigorously has argued that the forbearance policy promotes competition and serves the public interest, although the Supreme Court recently ruled that the policy exceeded the Commission's statutory authority under Section 203 of the Communications Act of 1934.^{4/} Now that the Commission has been granted, at its request,^{5/} explicit statutory authority to forbear from enforcing the tariff filing requirement, Hyperion anticipates the Commission will reinstate its previous policy.

Given the strong likelihood that the Commission will reinstate its forbearance policy, and the significant drain on resources caused by the requirement to file tariffs with specific rates, Hyperion respectfully requests that the Commission defer the effective date of its rules requiring the filing of such tariffs pending its consideration of the Petition. Consequently, during the period when the Commission considers Hyperion's Petition, tariffs with a range of rates should be deemed to comply with the requirements of Section 203 and the Commission's rules.

Permitting tariffs with a range of rates to be effective during this brief period will result in all the benefits the Commission envisioned when it adopted the range of rates policy

^{3/} *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Second Report and Order, 91 FCC 2d 59 (1982).

^{4/} *MCI Telecommunications Corp. v. AT&T*, 114 S.Ct. 2223 (1994).

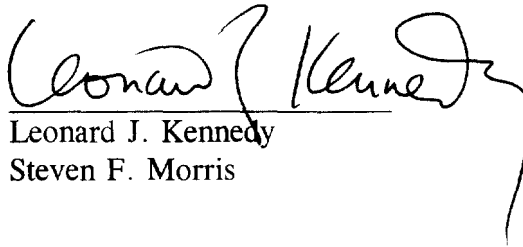
^{5/} *See Telecommunications Act of 1996 Enacts 21 Proposals to "Reinvent" Agency*, News release 61489 (rel. February 8, 1996).

in 1993.^{6/} Carriers will be relieved of the burden of developing specific tariffed rates and constantly changing those rates to meet competition, enabling them to focus their regulatory efforts on the Commission's implementation of the 1996 Act. At the same time, consumers will not be harmed because only carriers without market power will have tariffs on file that do not include specific rates.

For all the aforementioned reasons, Hyperion respectfully requests that the Commission grant this request to defer the effective date of its new tariff filing requirements.

Respectfully submitted,

HYPERION TELECOMMUNICATIONS, INC.



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February 15, 1996

^{6/} *Tariff Filing Requirements for Nondominant Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993).

CERTIFICATE OF SERVICE

I, Jeanette M. Corley, hereby certify that on this 15th day of February, 1996 I caused a copy of the MOTION FOR EXTENSION OF TIME TO FILE TARIFFS to be served by hand delivery to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Rm. 814
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Commissioner James H. Quello
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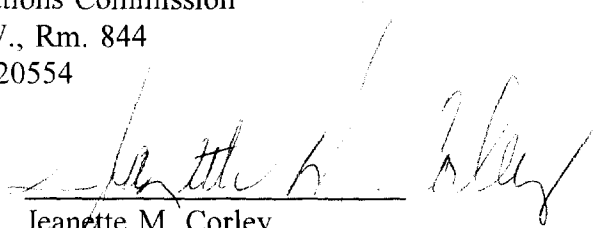
Commissioner Andrew C. Barrett
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Reinstatement of the Commission's)
Forbearance Policy With Regard to)
Tariff Filing Requirements for)
Nondominant Carriers)

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

PETITION REQUESTING FORBEARANCE

Hyperion Telecommunications, Inc. ("Hyperion"), by its attorneys and pursuant to Section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 10(c), hereby requests that the Commission reinstate its forbearance policy with regard to tariff filing requirements for nondominant carriers.^{1/} This action is explicitly authorized under the Telecommunications Act of 1996 and entirely consistent with the pro-competitive regime mandated by Congress. Moreover, as the Commission first concluded 14 years ago, forbearance from tariff filing requirements for carriers without market power serves the public interest.

I. BACKGROUND

The Commission's forbearance policy dates back to the early 1980's. In its historic *Competitive Common Carrier* decisions, the Commission found that imposing burdensome regulatory requirements on carriers that have no market power was not in the public interest.^{2/} The Commission stated:

^{1/} Hyperion is a competitive access provider that operates telecommunications networks throughout the country, typically in partnership with cable operators or electric utilities.

^{2/} See, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1 (1981)

The economic underpinning of our proposal to streamline the regulatory procedures for nondominant carriers flows from the fact that firms lacking market power cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act.^{3/}

The Commission initially decided to streamline its tariff filing requirements for nondominant carriers by eliminating cost support requirements.^{4/} Subsequently, the Commission determined that the requirement to file tariffs was unnecessarily burdensome, even if no cost support were required, because:

applying the tariff requirements to competitive entities is superfluous, since competition circumscribes the prices and practices of such companies. In addition, these requirements stifle price competition and service and marketing innovation.^{5/}

The decision to forbear from enforcing tariff requirements applicable to nondominant carriers was challenged by AT&T, which was the only non-LEC classified by the

("First Report and Order"); Second Report and Order, 91 FCC 2d 59 (1982) ("Second Report and Order"); Fourth Report and Order, 95 FCC 2d 554 (1983) ("Fourth Report and Order").

^{3/} *First Report and Order*, 85 FCC 2d at 31. As recently as this week the Commission reaffirmed its distinction between dominant and nondominant carriers in proposing to treat affiliates of the Bell Operating Companies as nondominant carriers when they provide out-of-region interexchange services. See *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, Notice of Proposed Rulemaking, CC Docket No. 96-21, FCC 96-59 (rel. February 14, 1996).

^{4/} *Id.* at 35.

^{5/} *Second Report and Order*, 91 FCC 2d at 71. The Commission initially decided to forbear from enforcing the tariff requirements of Section 203 of the 1934 Act against resellers of domestic services. Ultimately, the forbearance policy was extended to all domestic nondominant carriers. *Fourth Report and Order*, 95 FCC 2d at 578.

Commission as a dominant carrier.^{6/} After years of litigation, the Supreme Court held that Section 203 of the 1934 Act only provides the Commission with authority to "modify" the general requirement that common carriers file tariffs, but not to eliminate it completely.^{7/} The Court acknowledged that the forbearance policy was not inconsistent with sound public policy, but ruled that only Congress could give the Commission authority to forbear from statutory requirements. Accordingly, nondominant carriers presently are required to file tariffs at the Commission for all interstate services.^{8/}

II. FORBEARANCE FOR NONDOMINANT CARRIERS IS A SOUND PUBLIC POLICY THAT HAS BEEN AUTHORIZED BY CONGRESS

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996. The 1996 Act explicitly authorizes the Commission to forbear from regulating a telecommunications carrier or service, or any class of carriers or services.^{9/} Specifically,

^{6/} The Commission recently ruled that AT&T should be classified as a non-dominant carrier because it no longer has market power in the domestic interexchange market. *See Motion of AT&T to be Classified as a Non-Dominant Carrier*, Order, FCC 95-427 (rel. October 23, 1995).

^{7/} *MCI Telecommunications Corp. v. AT&T*, 114 S.Ct. 2223 (1994).

^{8/} Following the Supreme Court's decision in *MCI v. AT&T*, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Commission's decision to permit nondominant carriers to file tariffs listing a range of rates, rather than specific rates, violated its statutory authority. *Southwestern Bell Corporation v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995). On remand, the Commission adopted new rules requiring nondominant carriers to file tariffs with specific rates. Hyperion has filed today a request to defer the March 11, 1996 effective date of those rules pending the Commission's consideration of this Petition.

^{9/} This grant of forbearance authority was one of the 21 Commission proposals for "reinventing" the agency that were included in the 1996 Act. *See Telecommunications Act of 1996 Enacts 21 Proposals to "Reinvent" Agency*, News release 61489 (rel. February 8, 1996).

new Section 10(a) of the Communications Act requires the Commission to forbear from applying any regulation or provision of the Act if it determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

In light of this explicit grant of authority from Congress, there is no continued justification for requiring nondominant carriers to file tariffs. As described below, reinstating the forbearance policy satisfies the three criteria established by new Section 10(a).

First, tariff filing is not necessary to ensure that a nondominant carrier's charges or practices are reasonable and nondiscriminatory. As the Commission stated 14 years ago when it adopted a forbearance policy for resellers:

By not requiring tariffs of resellers, we are not abdicating our duty to ensure rates that are reasonable and not unjustly discriminatory. Competitive market forces, together with our power to intervene in appropriate cases, are sufficient checks on the pricing of resale services.^{10/}

Second, enforcement of the tariff filing requirements against nondominant carriers is not necessary for the protection of consumers. As the Commission found previously, the availability of competitive choices ensures that consumers are not harmed by the rates or

^{10/} *Second Report and Order*, 91 FCC 2d at 71.

practices of a nondominant carrier.^{11/} In rare cases when problem's arise, the Commission's complaint mechanism is available for the recovery of any damages caused by a carrier's violation of Section 201(b) or 202(a).

Finally, forbearance with regard to nondominant tariff requirements is consistent with the public interest. New Section 10(b) of the Communications Act states that the Commission can conclude the public interest is served if it determines that forbearance will promote competition among providers of telecommunications services. The Commission made such a determination over a decade ago and nothing has changed to warrant a different conclusion today.^{12/} Accordingly, reinstatement of the forbearance policy serves the public interest.

III. CONCLUSION

The Commission's forbearance policy is as sound today as it was when it first was adopted. As the Commission begins to implement the Telecommunications Act of 1996, it is fitting that one of its first acts should be the elimination of outdated regulatory requirements from the 1934 Act. Tariffs are a necessary regulatory tool when services are provided by a monopolist, but to a carrier with no market power they are simply a drain on resources that would be put to better use providing service to customers. Accordingly, for all the reasons

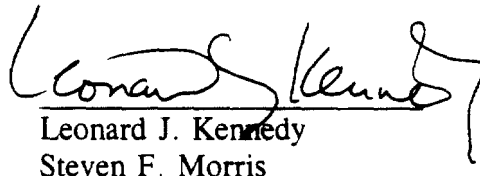
^{11/} *Id.*

^{12/} "[T]he purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and burdens for nondominant carriers. Such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs." *Fourth Report and Order*, 95 FCC 2d at 579-80.

cited herein, the Commission should reinstate its forbearance policy with regard to tariff filing requirements for nondominant carriers.

Respectfully submitted,

HYPERION TELECOMMUNICATIONS, INC.



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